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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JAN - 6 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Request by TV 14, Inc. to Amend)
Section 76.51 of the Commission's)
Rules to Include Rome, Georgia in the)
Atlanta, Georgia Television Market)

MM Docket No. ~~92-536~~
RM-8106

92-215

To: The Commission

COMMENTS OF WGNX INC.

At a time when the Commission's resources are being taxed to the limit by changes in the regulation of cable television, TV 14, Inc. ("WTLK") again seeks the Commission's help in finding its way onto Atlanta-area cable systems. WTLK's request could not be more ill-timed. There is another pending rulemaking dealing with the very market definition issue WTLK raises. In any case, the new federal cable legislation gives WTLK a legal right to the cable carriage it seeks.

For the reasons set out below, WGNX Inc., licensee of television station WGNX, Atlanta, Georgia (independent, channel 46), submits that WTLK has not shown good cause for adding a distant community to the Atlanta market identification. The Commission should not re-designate the Atlanta market as the "Atlanta-Rome" market, for purposes of Section 76.51 of the Commission's Rules,* or at least should await the outcome of the related rulemaking before concluding this proceeding.

* See Notice of Proposed Rulemaking, No. FCC-536, released December 8, 1992 ("Notice").

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List A B C D E

A. WTLK's Request.

This is WTLK's second trip to the Commission seeking to become part of the neighboring* Atlanta market. By letter dated December 14, 1990 ("Initial Request"), WTLK asked the Commission to declare it "local to and a part of" the Atlanta market. In 1991, over WGNX's and other stations' objections that a rule-making was the more appropriate proceeding, the Commission granted WTLK's request. TV 14, Inc., 6 FCC Rcd 7234 (1991). That ruling enabled WTLK to purchase syndicated program exclusivity against WGNX and other Atlanta market stations, and vice versa. Notice at 1 n.2.

WTLK sought this exclusivity two years ago despite its assertion, then and now, that it wishes to provide a unique program format consisting of local, rather than syndicated programming. See Initial Request at 4-5; Petition for Rule Making at 7-8 (filed June 3, 1992) ("Petition").

WTLK's promises of a unique program format apparently have not been enough to interest cable systems in carrying its signal. WTLK says it filed its Petition, in part, because "a number of Atlanta-area cable systems were uncomfortable claiming WTLK as a local signal for purposes of the compulsory copyright license." Petition at 3. Thus, WTLK seeks to become a copyright-free local signal throughout the Atlanta television market even though, as the Copyright Office observed, WTLK does

* Rome is 56 miles from Atlanta. Petition at 1.

not place a grade B signal over the entire market. Letter from Dorothy Schrader, Petition, Attachment 3, at 3.

B. WTLK's Request Is Ill-Timed.

WTLK's Petition could not have been timed more poorly. At the very time this rulemaking is pending — seeking to redesignate the Atlanta market in the table of top-100 markets in Section 76.51 of the Commission's Rules — the Commission has another rulemaking pending encompassing this and broader, related issues.

Though mentioned only in passing in the Notice (at 2 n.2), the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 ("Cable Act"), expressly requires the FCC to "update section 76.51 of title 47 of the Code of Federal Regulations." 47 U.S.C. § 534(f). The statute sets a fast-track timetable: the update must be completed by early April 1993, 180 days after enactment of the statute. Id.

At the statute's direction, the Commission has issued a rulemaking notice seeking comments on this issue.* Initial comments were filed on January 4, and reply comments are due January 19, 1993. The notice raises numerous pertinent questions about revision of § 76.51, which has gone largely unchanged over the past two decades. The Cable Act Notice, for example, specifically asks commenting parties whether the Commission should consider "the possible copyright implications of any changes we

* Notice of Proposed Rule Making, Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues, MM Docket No. 92-259, FCC 92-499, released November 19, 1992 ("Cable Act Notice").

make" in revising the list. Id. at 11 n.24. This is the very issue raised by WTLK's Petition.

The Cable Act Notice also asks how the list can be modified to ensure that it reflects current market realities. It inquires how often the list should be updated, and urges consideration of the effects that changes in the list will have on the Commission's exclusivity and nonduplication rules. Id., ¶¶ 22-23. Indeed, because of the complexity of the issue and its interrelation with other rules, the Commission used the Cable Act Notice to reopen the program exclusivity docket for further comments. Id. at 12 n.27.

Considering the expedited track the Cable Act rule-making has been placed on, and the thorough analysis that will be made of the interrelated issues involved, WGNX urges the Commission to marshal its resources and await the results of that rule-making. Such a course of action may moot this proceeding, and more importantly, will avoid inconsistent or improvident results.

For example, if the FCC takes one option open to it and adopts the current Arbitron market list (see Cable Act Notice, ¶ 22), the Atlanta market will be re-designated "Atlanta (Athens & Rome)," rather than "Atlanta-Rome," as proposed by WTLK.*

Moreover, if the Commission in this proceeding accepts WTLK's view that a parenthetical reference in an Arbitron market

* WTLK's Petition is misleading by failing to note that under the current 1991-92 Arbitron market list, Athens, Georgia is as much a part of the Atlanta market as is Rome. See 1992 Broadcasting & Cable Market Place at E-21.

listing — such as "Atlanta (Athens & Rome)" — justifies hyphenation for purposes of new § 76.51, the FCC will have opened a proverbial Pandora's box. In the top 100 markets alone, fully 47 now include parenthetical community identifications (a step below hyphenation) that differ from the current listings in § 76.51. 1992 Broadcasting & Cable Market Place, E17-E93. These include 7 of the top 10 markets, and three in the State of Georgia. This issue is distinct from the point raised in the Cable Act Notice — that the designated communities of 23 of the top 100 markets differ between the current ADI list and § 76.51's list. Id. at 12 n.26.

WGNX submits that the Commission should take advantage of the global analysis of the problems raised by WTLK's petition through the Cable Act rulemaking that is now underway, and is scheduled for completion on an expedited schedule. Failure to coordinate the two rulemakings could yield inconsistent results, a chorus of other "special case" requests, and duplication of Commission efforts. WGNX suggests that action on WTLK's Petition either be held in abeyance pending the outcome of the Cable Act rulemaking, or that the two proceedings be merged.*

C. The Cable Act Solves WTLK's Problems

As ill-timed as WTLK's Petition is, the Cable Act could not have come at a better time for the station. An Act of

* Moreover, even if WTLK remains a distant signal for some Atlanta-area cable systems, these systems are not likely to begin carrying it until July 1, the start of the next semi-annual accounting period for purposes of cable copyright royalties.

Congress has given WTLK the right to negotiate with cable systems for the right to retransmit its signal. And, for cable systems who do not find WTLK's promise of a unique program format* attractive enough to enter into a consensual carriage agreement,

* WTLK misleads the Commission, we submit, in touting its program format. In 1990, the station pledged that "WTLK will move toward a 24-hour per day all-talk television format, the first of its kind in the country." Initial Request at 4. At the time, WTLK noted it was carrying talk shows such as "Donahue" and "Sally Jessy Raphael" in prime time. The station promised to "begin producing local talk programs hosted by local celebrities and dealing with local issues of public importance. Locally produced public affairs programming will not be done grudgingly, as is so often the case on most independent stations, but instead will constitute the very heart of WTLK's programming." *Id.*, 5 (emphasis in original).

It is now 1993. In its Petition, WTLK repeats the above-quoted promises *verbatim*, except to delete references to the syndicated talk shows. WTLK still says it "is moving toward" the 24-hour talk format. Petition at 8. To the best of WGNX's knowledge, as a competitor in the market WTLK seeks to join, WTLK has made no movement whatsoever, except to drop the syndicated talk shows it once carried. A current WTLK program schedule taken from the December 26, 1992 to January 1, 1993 issue of TV Guide demonstrates this. (See Attachment 1; see also statements about a 24-hour talk show format to the same effect in the Atlanta Journal article attached to the Petition.) We raise this point not because a station's right to be included in a market should depend on its program schedule, but because WTLK has made the same emphatic promises for over two years but has shown no inclination to fulfill them. Given the pace at which the station has moved toward its stated goals, we submit there is no need to short-circuit the Cable Act rulemaking as discussed above. Moreover, WTLK's failure should disqualify it from claiming credit under Part (4) of the Television Muscle Shoals analysis (see Notice, ¶ 6 at 3) for its programming in seeking redesignation of the market. Petition at 8. Finally, WTLK should not be heard to lament that unwilling cable operators have prevented it from inaugurating its promised program fare. With no expectancy of mandatory carriage until the Cable Act's recent passage, WTLK's best course, it would seem, would have been to launch its program format to make itself attractive to cable viewers and "earn" its way onto Atlanta-area cable systems.

the Cable Act gives WTLK must-carry rights throughout the Atlanta ADI. 47 U.S.C. § 534(h)(1)(C); Cable Act Notice ¶ 18.*

In sum, the Cable Act gives WTLK the right to reach the very Atlanta-ADI cable viewers it longs to reach. Why then, its Petition? Because WTLK, located some 56 miles distant from Atlanta, would like to be carried copyright-free throughout the ADI, including suburban communities southwest of Atlanta that are over 80 miles away and which it cannot reach over the air.

D. WTLK Has Not Proved Its Case.

WGNX must remind the Commission that while WTLK has cleverly positioned its transmitter as close to Atlanta as possible, it is licensed to serve Rome. Rome is culturally and geographically distant from Atlanta, and is considerably further from Atlanta, for example, than Baltimore is from Washington, D.C. Though Congress has given WTLK the benefit of mandatory carriage rights throughout the Atlanta ADI, it has not undone the rules that continue to make WTLK (and WGNX) a "distant" signal in areas more than 35 miles from the city it is licensed to serve. Thus, thanks to the Cable Act, WTLK is in a different situation than was presented in Major Television Markets (Orlando-Daytona Beach-Melbourne-Cocoa, Florida), 57 R.R.2d 685, 692 (1985), where under the old must-carry rules the station seeking redesignation

* This is subject to the qualification that communities may be added to or excluded from an ADI. § 534(h)(1)(C), Cable Act Notice, ¶¶ 19-20. We assume the burden of proof will be placed on a party seeking a variance from Arbitron's definition.

of the market could not demand carriage in the communities it sought to reach by cable.

Unless and until the Commission, in the Cable Act rulemaking, changes the market definitions that distinguish distant from local signals for cable copyright purposes, WGNX submits that WTLK has not justified being considered "local" throughout the Atlanta ADI, or for re-designating* the market identification.**

WTLK has submitted only a series of newspaper clippings, its listings in TV Guide, its coverage map, the fact that Arbitron lists gives Rome a parenthetical (not hyphenated) reference in the Atlanta market listing, and a letter of rebuff from the Copyright Office to support its case. WTLK has not submitted population or viewing studies sufficient to show that Atlanta (or Atlanta-Rome, or Atlanta-Rome-Athens) is "characterized by more than one major population center supporting all stations in the market but with competing stations licensed to different cities within the market area." Notice at 3 (citation omitted).

* WTLK's Petition (at 5, 7) speaks of "rehyphenation" of the Atlanta market, which is a misnomer, since WTLK seeks to make Atlanta a hyphenated market for the first time.

** While some program syndicators may view WTLK as an Atlanta-market station, see Notice at 4, ¶ 7, that is by WTLK's choice. When it filed its Initial Request in 1990, WTLK had under license many of the movies also found in WGNX's library, and carried "Donahue" and other talk shows seen on Atlanta stations. Atlanta stations obtained the right to buy programming on an exclusive basis against WTLK (and vice-versa) only at WTLK's instance.

In summary, WTLK has the right to bargain for carriage on local cable systems and to demand compulsory carriage. It has the right to present the unique program offerings it has promised for over two years to attract attention, advertisers and cable viewers. Within a few short months, the Commission will have completed the rulemaking to update § 76.51 of the Rules, which will give stations in all markets, including "Atlanta (Athens & Rome)," the right to be considered "local" or "distant" after a full Commission review of the relevant considerations of communications and copyright law.

WGNX submits that WTLK has not made the case to short-circuit the Commission's long-overdue review of Section 76.51 by pressing for a hurried decision in this proceeding.

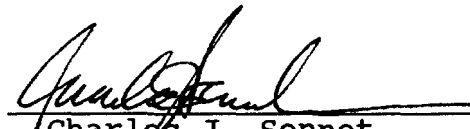
CONCLUSION

For the foregoing reasons, WGNX submits that the Commission should not re-designate the Atlanta market as proposed. Alternatively, the Commission should consolidate this rulemaking for decision with MM Docket No. 92-259, or defer a final decision pending the outcome of that proceeding.

Respectfully submitted,

WGNX INC.

By


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Its Attorney

Dated: January 6, 1992

WTLK PROGRAM GRID								
	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY	
6:00	CBS News	CBS News	CBS News	CBS News	CBS News	Outdoor Gazette	Movie (Con't)	6:00
6:30						Fishing the West		6:30
7:00	This Morning	This Morning	This Morning	This Morning	This Morning	Outdoors with Dean Durham	Georgia Farm Monitor	7:00
7:30						Commercial Program	Gospel Tabernacle	7:30
8:00						America's Backyard	Time to Arise	8:00
8:30						Children Crying/Door	TBA	8:30
9:00	Faith Daniels	Faith Daniels	Faith Daniels	Faith Daniels	Faith Daniels	Commercial Program	Commercial Program	9:00
9:30	Concentration	Concentration	Concentration	Concentration	Concentration	Pam and Buffy		9:30
10:00	Family Feud Challenge	Family Feud Challenge	Family Feud Challenge	Family Feud Challenge	TBA	Saved by The Bell	TBA	10:00
10:30						Sunshine Factory	Commercial Program	10:30
11:00	Commercial Program	Commercial Program	Commercial Program	Commercial Program	Commercial Program	Saved by The Bell		11:00
11:30	Movie	Movie	Movie	Movie	Movie	Name Your Adventure	TBA	11:30
12:00						Newsworthy	Color of Money	12:00
12:30						Wall Street Journal Report	TBA	12:30
1:00	Miracles of Faith	Miracles of Faith	Miracles of Faith	Miracles of Faith	Miracles of Faith	Commercial Program	Gold Prospector's Show	1:00
1:30						Greatest Sports Legends	Movie	1:30
2:00	TBA	TBA	TBA	TBA	Commercial Program	Club Golf		2:00
2:30						TBA		2:30
3:00	Rocky Marlowe Country	Rocky Marlowe Country	Rocky Marlowe Country	Rocky Marlowe Country	Rocky Marlowe Country	Commercial Program		3:00
3:30						U.S. Pro Ski Tour	Holiday Spirit	3:30
4:00								4:00
4:30						TBA	TBA	4:30
5:00						Tropical Beat		5:00
5:30							Commercial Program	5:30
6:00	American Trail	American Trail	American Trail	American Trail	Masterseller New Year's Eve Celebration	New Dance	Somalia	6:00
6:30	TBA	TBA	TBA	TBA			Commercial Program	6:30
7:00						Rollergames		7:00
7:30	Country Music Time	Country Music Time	Country Music Time	Country Music Time	Country Music Time		Bobby Cremins Basketball	7:30
8:00							Commercial Program	8:00
8:30						WWF Wrestling	TBA	8:30
9:00							Church Service	9:00
9:30								9:30
10:00						WWF Wrestling	World Changers Ministries	10:00
10:30								10:30
11:00	TBA	Commercial Program	TBA	TBA	Commercial Program	WCW Wrestling	Rollergames	11:00
11:30					TBA			11:30
12:00	Movie	Movie	Tropical Beat	New Year's Eve Movie	Movie	IFW Wrestling	New Dance	12:00
12:30								12:30
1:00			Movie			Movie	Movie	1:00
1:30								1:30
2:00	Movie	Movie		Movie	Karaoke America Movie			2:00
2:30								2:30
3:00						Movie		3:00
3:30								3:30
4:00			Make Room For Daddy	Country Hit Video				4:00
4:30	Nostalgic Moments		Ozzie & Harriet	Ozzie & Harriet				4:30
5:00	Kurt Wolfe's World/Health	Kurt Wolfe's World/Health	Kurt Wolfe's World/Health	Kurt Wolfe's World/Health	TBA	Movie	Kurt Wolfe's World/Health	5:00
5:30	Morning Stretch	Morning Stretch	Morning Stretch	Morning Stretch	Outdoorsman		Morning Stretch	5:30

Source: TV Guide, 12/26/92

CERTIFICATE OF SERVICE

This will certify that a complete copy of the foregoing Comments of WGNX Inc. was sent this 6th day of January, 1993, via first-class United States Mail, postage prepaid, to:

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January 6, 1993